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IN THE

# Supreme Court of the United States

**October Term, 1957**

**No. 888**

FIRST NATIONAL BANK IN INDIANA, PENNSYLVANIA,

*Petitioner,*

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

First National Bank in Indiana, Pa. prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered February 5, 1957 affirming the judgment of the District Court against Petitioner First National Bank in Indiana, Pa. which became final upon denial of petition for rehearing March 12, 1957.

### I. Opinions below and in this Court.

The opinion of the District Court is unreported and is printed in the Appendix "A" of this petition, page 16.

The *first* opinion of the Court of Appeals and dissenting opinion is reported in 226 Fed. 2nd 297. For convenience of the Court we have had copy of material excerpt of the majority opinion printed in the Appendix "B", page 18.

Decision of the United States Supreme Court on this case is reported at 352 U. S. 29; for convenience of the Court copies of the majority opinion and dissenting opinion are printed in the Appendix "C", page 19. The *second* opinion of the United States Court of Appeals for the Third Circuit is unreported but for convenience of the Court a copl is printed in the Appendix "D", page 25.

## II. Jurisdiction.

(a) The date that the judgment was entered was February 5, 1957.

(b) The said judgment became final upon the denial of petition for rehearing on March 12, 1957.

(c) The jurisdiction of this Court is invoked under the Act of Congress of June 28, 1948 C. 646, 62 Stat. 928 as amended. (28 U. S. C. 1254 (1).)

## III. Questions Presented.

1. The United States Court of Appeals has drastically contravened an important principle of the law of Pennsylvania and decided this case exactly contrary to the decision of the highest Appellate Court of that Commonwealth.

2. The Court of Appeals comes to an entirely opposite factual conclusion in its second decision from that of its first decision, without giving any reasons therefor.

## IV. Statutes Involved.

Conformity Act, Title 28 U. S. C. A. Section 1652.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 656, 62 Stat. 944.

Negotiable Instruments Law of Pennsylvania.

Act of May 16, 1901, P. L. 194, Ch. I, Art. IV, Section 56,

56 Purdon's Pennsylvania Laws, Sec. 136.

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

## V. Statement of the Case.

This is a civil action brought by Bank of America National Trust and Savings Association of San Francisco, California against, *inter alia*, First National Bank in Indiana, of Indiana, Pennsylvania, this petitioner, wherein this petitioner is charged separately with having converted on September 28, 1948 and October 25, 1948, respectively, two lots of Home Owners' Loan Corporation bonds of the value of $57,600.00. The bonds in question were all issued under Act of Congress approved April 27, 1934, were at all relevant times negotiable, payable to bearer, guaranteed by the United States Government and subject to call on or after May 1, 1944 but not due until

May 1, 1952. (See Exhibit 1-A Record, specimen copy of bond 449a and plaintiff's Answer to Defendant Bank's Request for Admissions 28a.) The bonds had been called for redemption on May 1, 1944 (Record 64a).

All of the bonds in this case with other securities disappeared from plaintiff's banking place of business, San Francisco, California on May 2, 1944 (the story of this disappearance appears in testimony of Miss Britton, 59a to 71a).

The bonds, the subject of suit, were handled through Defendant Bank in two separate lots, at separate times under identical facts, as to this Defendant. We state the facts as to only one lot.

The bonds described in the Complaint in the condition received (13a) were placed in the hands of Defendant Bank on September 28, 1948 for redemption or collection by Gilbert S. Parnell, an attorney, a depositor of the bank and also a director, without Defendant Bank having any notice of defect or infirmity. (See Plaintiff's Answer to Defendant Bank's Request for Admissions (b), 28a and testimony of cashier of Defendant Bank 339a to 341a, inclusive.) This lot of bonds was sent in the condition received on September 28, 1948 by letter signed by T. Edgar Walker, Assistant Cashier of Defendant Bank, to the Pittsburgh Branch of Federal Reserve Bank of Cleveland for redemption (letter Exhibit 1, 20a). Pittsburgh Branch of Federal Reserve Bank credited the proceeds of redemption on September 30, 1948 of this first lot of bonds to First National Bank in Indiana, Pa. in the sum of $19,600.00 (Ex. 2, 21a). First National Bank in Indiana, on October 1, 1948 paid by cashier's check signed by T. Edgar Walker, Assistant Cashier, to the order of Gilbert S. Parnell, attorney at law, the sum of $19,590.00, $10.00

having been deducted as the bank's expenses (see Ex. 3, 22a, also record 332a to 334a, inclusive).

Judgment was entered upon jury verdict against Petitioner, Defendant First National Bank in Indiana, in the sum of $57,600.00 without interest. In due course, appeal was taken to the Court of Appeal for the Third Circuit. After argument before three judges, and then argument before the Circuit Court *en banc* of seven judges, the Court of Appeals, by a majority opinion of four judges on October 12, 1955, reversed the judgment of the District Court and ordered judgment entered in favor of Petitioner First National Bank in Indiana (Opinion Excerpts —Appendix B hereto).

Thereafter a Writ of Certiorari was granted by this Honorable Court to review the judgment of the Court of Appeals. Following argument before this Honorable Court, on November 13, 1956 a majority opinion, written by Mr. Justice Frankfurter in which a dissent opinion was filed by Mr. Justice Black, joined in by Mr. Justice Douglas, the Court remanded the case to the United States Court of Appeals for further proceedings in accordance therewith (Opinion and Dissent—Appendix C hereto).

A hearing was again had before the United States Court of Appeals and on February 5, 1957 the Court of Appeals entered an order affirming the judgment of the District Court (Opinion—Appendix D hereto).

The facts which the Court of Appeals in this *second* opinion cites as lack of evidence of good faith by Petitioner, Bank in Indiana, i.e. knowledge of call, telephone notice to depositor when funds available, delivery of cashier's check and cashing thereof, are the identical facts which the same Court in its *first* opinion, holds clearly to

be no evidence whatever of bad faith. (Compare Excerpt Opinion—Appendix B with Opinion—Appendix D, Topic II, para. 2).

In view of an incorrect application of state law of Pennsylvania to this case, as directed by the judgment of this Honorable Court, a petition for a Writ of Certiorari is here submitted.

## VI. Reason For Granting Writ of Certiorari and Argument.

### IN AFFIRMING THE JUDGMENT OF THE TRIAL COURT, THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF LAW OF THE STATE OF PENNSYLVANIA IN A WAY WHICH IS IN CONFLICT WITH PENNSYLVANIA STATE DECISIONS

#### Where There Are Special And Important Reasons, As Here, The United States Supreme Court Will Review The Decision Of The Court Of Appeals When In Conflict With Applicable State Law.

Where there are special and important reasons therefor, this Honorable Court will review on certiorari an important state or territorial question decided in a way in conflict with applicable state or territorial law. (Rule 19, 1(b) Supreme Court Rules, 28 United States Code Annotated.)

Considerations here are of the greatest import to general banking practice. The service to a customer which the petitioner bank was performing for a nominal charge to cover transmittal expenses, was one which is being done by all banks daily. Such enables the free flow of negotiable paper in commerce. Banks are a primary agent or conduit for the transmittal of negotiable bonds, notes, drafts, letters of credit and all such documentary instruments of

credit. This is not a direct source of revenue for them, their prime business being the investment of funds in their hands for security. If the risk of collection business becomes too great, they will stop. (Service charges by banks are becoming more and more common to avoid a deficit in their collection type of work.) Any decision such as this decision of the Court of Appeals, the subject of this petition, which places such heavy liability on a conduit bank ($57,600 for a $30.00 service charge) where there is an absolute void of proof of bad faith, must of necessity, leave an extremely deterrent effect on a long established and widely used banking practice. Not just this decision, but the change in the policy of the law, without reason, is bad. Our argument is, therefore, in this petition, directed primarily at showing that the present decision of the Court of Appeals is of the greatest import and is clearly *not* the law of Pennsylvania, and that the Court of Appeals should follow that state's law as just and correct.

**Did The Decision Of The United States Court Of Appeals Follow And Apply The Decisions Of The Highest State Court Of Pennsylvania?**

We respectfully and unequivocally answer this question that it did not. The United States Court of Appeals, in its *first decision* October 12, 1955, specifically held:

> "As far as the Indiana Bank was concerned, we do not think there was any evidence of bad faith." (Then followed a complete analysis of the facts.) (Opinion reported 226 Fed. 2nd 297) (Excerpt opinion—Appendix B.)

The Court in its present decision, points to nothing whatever except suspicious circumstances, stating: "The circumstances with regard to negotiations were such as to arouse some suspicion." (Opinion—Appendix "D".)

Reserving our discussion of the facts, which we will refer to later, let us here refer to what the decisions of the highest court of the State of Pennsylvania has declared is the law to charge a defendant bank such as in the instant case, with liability.

The leading case which answers this question is the case of *First National Bank of Blairstown vs. Goldberg et al.*, 340 Pa. 337. The facts of the Goldberg case are substantially identical to those of the case at bar. As to the defendant bank in the Goldberg case, the Pennsylvania Supreme Court sets aside the verdict against it and enters judgment in the defendant Bank's favor, regardless of burden of proof. The Goldberg case is the one case directly in point. All others are rationale. The decision of the Court of Appeals here in question is diametrically opposite. The opinion in this case, page 340, most specifically states the law with supporting authorities, in the following language:

> "To defeat the rights of one dealing with negotiable securities it is not enough to show that he took them under circumstances which ought to excite the suspicion of a prudent man and cause him to make inquiry, but that he had actual knowledge of an infirmity or defect, or of such facts that his failure to make further inquiry would indicate a deliberate desire on his part to evade knowledge because of a belief or fear that investigation would disclose a vice in the transaction. This test, that of good faith with respect to negotiable instruments, is prescribed alike at common law, by the Negotiable Instruments Law of 1901, P. L. 194, and by the Uniform Fiduciaries Act of 1923, P. L. 468: *Phelan v. Moss,* 67 Pa. 59; *Union Bank & Trust Co. v. Girard Trust Co.,* 307 Pa. 488, 500, 501, 161 A. 865, 868, 869; *Davis, Trustee v. Pennsylvania Company,* 337 Pa. 456, 459, 460, 12 A. 2d 66, 68, 69."

Here this Court definitely states "suspicious circumstances" are not enough.

The following authorities support this position:

*Davis vs. Pennsylvania Co.*, 337 Pa. 456 March 25, 1940 at page 460: * * * It was not sufficient to establish notice of such infirmity or defect in title by proof of circumstances which ought to excite the suspicion of a prudent man, but that it is necessary to prove actual bad faith."

*Union Bank & Trust Co. vs. Girard Trust Co.*, 307 Pa. 488 at page 500: "Bad faith is not a matter of conjecture; it must be proved, and, like many other facts may be proved by circumstantial evidence; but it is well settled that it is not sufficient to show suspicious circumstances * * * such as might lead a person before taking a paper to make inquiry, but material *mala fides* must be proved."

The above cases cite and refer to Section 56 of the Negotiable Instruments Law, 56 Purdon's Section 136, defining what constitutes notice of infirmity or defect:

> "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. (1901, May 16, P. L. 194, ch. I, art. IV, Section 56.)"

Therefore under the Pennsylvania law "suspicious circumstances or circumstances * * * such as to arouse some suspicion" is not sufficient to charge bad faith. Actual knowledge of an infirmity or defect or such facts that failure to make inquiry would indicate a deliberate desire to evade knowledge is required. The United States Court of Appeals has failed to assess the evidence in this case as required in this light, as we will point out hereinafter.

**Discussion Of The Assessment Of The Evidence In The Light Of The Standard Of Pennsylvania Law.**

This case is important for two reasons: first, unless reversed, it places a liability on Defendant Bank, an innocent party in a transaction with a respected citizen of the community in which it profited nothing; and secondly, it is of public importance for if not reversed, the banking industry generally will never be safe in accepting negotiable bearer paper for collection or redemption. The injustice of the result of this case, as now reached, has presented the major question to which this United States Supreme Court went out of its way to have determined by the United States Court of Appeals. This Court called attention to the fact that irrespective of where the burden of proof lay, the question is whether the *entire record* establishes that there was bad faith on the part of Defendant Bank so that the verdict of the jury was wholly arbitrary and untenable. This Court evidently felt that this was the major question because, it nevertheless included in addition in the terms of its remand, namely that this Court (the United States Court of Appeals) "should assess the evidence in the light of that (Pennsylvania) standard".

*What was the United States Court of Appeals test of liability?*

The present opinion of the Court talks only of "some suspicious circumstances". That is not and never was the test in Pennsylvania. The Pennsylvania law is as stated in the Goldberg case, 340 Pa. 337, 340 as quoted *supra*. Under that and other cases, to create a liability the record must show *as a whole* not negligence, however great, but bad faith, which means actual knowledge or evasion to avoid knowledge, amounting therefore to real dishonesty and thereby approaching even criminal responsibility.

*Where is there any evidence of bad faith in the record in this case?*

The original opinion of this Court, after discussing each and all of the circumstances, categorically said there was no such evidence. That was a majority opinion and it is difficult to understand why there is now a reversal on that question by the Court without suggesting any explanation therefor. Not only is there no such evidence of *bad* faith, but the circumstances affirmatively showed *good* faith and, therefore, satisfied the burden of the bank in that respect.

*What does the record show?* It is said by the Court of Appeals that the bonds were overdue, but this Court by its opinion holds to the contrary by not reversing the first opinion of the Court of Appeals and the first decision of the Court of Appeals upon the case (Appendix B herewith) so held. Moreover, the Federal Reserve Bank accepted the bonds without question, which, in itself, shows that there was nothing suspicious about them by reason of that fact; indeed, the Federal Reserve Bank was exempted from liability in this case. It is said that the bank notified Parnell when the redemption money was received by it. This was such an ordinary courtesy under the circumstances, so insignificant and trivial, especially in view of the fact that Parnell was a director of the bank, that it would seem scarcely worthy of mention. It is said that Parnell, after receiving the cashier's checks, immediately had them cashed in bills of small denominations. But, after receiving the checks, the transaction was closed and his *subsequent* cashing of the checks could not possibly have shown that anything was wrong at the time he brought in the bonds for redemption, which is the time

the goodwill of the transaction must be judged. But, in any event, there was nothing sinister, suspicious, or even unusual in the cashing of the checks, for Parnell might reasonably have wanted or required the cash for some entirely proper purpose; that it was given in small denominations was not at his request, but because the bank, which is a bank in a small town, had only small bills in its possession. How could this cashing of the checks in small bills raise a suspicion in the mind of the cashier that the bonds had been stolen?

*Note:* It is well to note that the first decision of the Court of Appeals holds clearly that under Federal Law the bonds were negotiable after call but before final maturity. This Honorable Court held that "overdueness" was a Federal Question and thus did not reverse that holding. Yet, without reason, the current opinion of the Court of Appeals, would seem to reverse that holding by holding that knowledge of the call was notice to the bank.

Not only, therefore, were there no suspicious circumstances requiring or warranting any unusual inquiries on the part of the bank, but, on the contrary, it was dealing with a lawyer who had lived in this comparatively small community and practiced law there for many years, and, accordingly, was presumably well-known and respected at the bank, of which he was a director; he was, therefore, far from being merely a passing stranger. How could a cashier, dealing with a director, challenge or suspect his honesty when there was not the slightest ground for thinking that there was anything wrong or unusual in a mere request to transmit some bonds to the Federal Reserve Bank for redemption? As far as the Assistant Cashier was concerned, he being deceased, no presumption can arise that *he* was guilty of any wrongdoing. What more, then,

could the bank have done by way of testimony to satisfy its burden of proof? It certainly was not necessary for each of its officers and directors to go on the witness stand and affirmatively swear that he knew nothing about the transaction or of any irregularity in connection with it. If the record as a whole shows no semblance of bad faith, the bank certainly has met the burden imposed upon it. Here "some suspicion" was certainly far less than in the Goldberg case, where, although the burden of exculpation of wrongdoing was placed upon the bank, and although the jury rendered a verdict against the bank, the trial court granted an *n. o. v.* which the Supreme Court of Pennsylvania sustained. The Goldberg case is clear authority for the proposition that, on the basis of the record as a whole, if the circumstances indicate that there was no bad faith on the part of the bank in the transaction, the Court should nullify a merely capricious and unsupportable verdict.

## VII. Decisions of Other States Holding Contra to the Present Decision of United States Court of Appeals.

While uniformity of State decisions is of no moment whatever under usual circumstances before this Court, this case is unique and should be considered in the light of the fact that it is decided under a uniform law, where the several states have thus shown desire for such uniformity; the circuit should not be permitted to so decide this case that it sets down a principle as if Pennsylvania law, contrary to that which the Penna. Supreme Court specifically has found the Pennsylvania law to be and particularly where the State Supreme Court is in accord with other states. With but little further comment we state some of the cases of other states as follows:

*Gruntal v. Nat. Surety Corp.*, 254 N. Y. 483, 173 N. E. 682, 73 A. L. R. 1337;

*Pratt v. Higginson,* 230 Wash. 256, 119 N. E. 661;
and
Filasi v. Crossman, 111 Conn. 178, 149 Atl. 774.

In fact the opinion of the United States Court of Appeals concedes this Connecticut case supports our contention. On page 4 of the opinion (Appendix "B") is stated the following: "The argument is pressed that the cited section (referring to Section 59 of Negotiable Instruments Law) refers to actions on the instruments only and not to such a case as this. Filasi v. Crossman, 111 Conn. 178 (1930) is cited in support of this agreement. The language of Justice Wheeler does support it." We respectfully submit that Pennsylvania Law, too, is in accord and should not be tortured to a contrary position.

## VIII. Conclusion.

This case was before this Honorable Court at No. 22 October Term, 1955. This Court, realizing the gravity of the case, remanded it to the United States Court of Appeals, directing it to assess the evidence irrespective of where the burden of proof lay. This could mean nothing other than an assessment or review of *all the evidence.* The United States Court of Appeals has disregarded the mandate of this Court in its failure to follow its direction to review all of the evidence and follow the applicable law of the State of Pennsylvania.

Basically, the clear and unexplained circumstance exists that, under identical facts, the Supreme Court of Pennsylvania sustained a judgment *N. O. V.* (notwithstanding a verdict) in favor of the defendant bank, and yet here, the Court of Appeals has seen fit to sustain judgment in favor of plaintiff on the verdict. The two results are legally and practically totally incompatible.

The Court of Appeals should not be permitted by consideration solely of its own choosing to contravene the law of the Commonwealth of Pennsylvania as clearly enunciated by the Highest Court of that state.

We therefore earnestly pray this Honorable Court to grant a Writ of Certiorari in order to correct the injustice to this defendant and avoid a different ruling by the United States Court of Appeals than that established by the highest state courts of Pennsylvania.

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## APPENDIX A.

### Memorandum Opinion of District Court and Order.

WILLSON, *D. J.*

This case might be termed the civil aftermath of the criminal case tried by Judge Marsh in this Court and reported as *United States v. Rocco*, 99 F. Supp. 746, affirmed *per curiam* by the Court of Appeals, 193 F. 2d 1008. One phase of the litigation relating to the disappearance of bonds from plaintiff's bank was before Judge Gourley on a motion for summary judgment and is reported in *National Surety Corp. v. First National Bank in Indiana*, 106 F. Supp. 302. The verdict of the jury was in favor of plaintiff in the amount of $57,600.00 against each of the three defendants, which was the face value of the bonds. The jury did not award any interest.

Defendants Gilbert S. Parnell and the First National Bank in Indiana ("Bank in Indiana") have motions pending for judgment *N. O. V.* and for a new trial. Defendant Arthur A. Rocco filed similar motions but withdrew them at the argument. Parnell and the Bank in Indiana insist that there was insufficient evidence to go to the jury and that the burden as to good faith was on the plaintiff throughout the case. Plaintiff's evidence indicated that the bonds in question were stolen from its bank on May 2, 1944. This point was left to the jury in the charge. The bonds were handed to the Bank in Indiana by Parnell and were, by the Bank in Indiana, forwarded to the Federal Reserve Bank by letter for collection. Neither Parnell nor the Bank in Indiana claimed to be a holder in due course within the definition of that term in the Negotiable Instruments Act, 56 P. S. 132. At the close of plaintiff's evidence, a motion by the Federal Reserve Bank of Cleve-

land for a directed verdict in its favor under Rule 50 (a) was granted. Plaintiff at argument indicated that it would not pursue that matter further so that under the present record the Federal Reserve Bank of Cleveland is dismissed finally from the case. The case was tried on the theory that the evidence indicated that the bonds were stolen from the plaintiff and that the defendants Parnell and the Bank in Indiana, not having paid anything of value for the bonds, were under the duty of showing that they acquired possession of the bonds innocently and in good faith and that in the trial the burden rested on them to show good faith. With respect to the trial procedure, especially in regard to the burden of proof, this Court followed the principles enunciated in *First National Bank of Blairstown v. Goldberg,* 340 Pa. 337. The question as to whether defendants Parnell and the Bank in Indiana acted innocently and in good faith was for the jury. The jury has spoken and it is believed that the verdict is just and proper under the evidence presented. In the opinion of the Court substantial justice is done by the jury's verdict. The motions will be refused.

Plaintiff presented a motion to amend the judgment by adding to the $57,600.00 principal, interest at six per centum on the various amounts which made up the jury's verdict. The matter of interest was left to the jury under the charge. It was indicated to the jury that it might give interest from the date of the loss of the bonds to the date of the verdict and fix the rate of interest. It is pointed out that the claim of plaintiff was unliquidated until the verdict. It is believed that the question of interest is discretionary and again the Court is not disposed to disturb the finding of the jury. Accordingly, the motion to amend the judgment in this respect will be refused.

## ORDER.

AND NOW, this 16th day of November, 1954, it is ORDERED:

2. Motions of the First National Bank in Indiana for judgment *N. O. V.* in its favor and for a new trial are refused.

JOSEPH P. WILLSON,
*United States District Judge.*

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## APPENDIX B.

### Material Excerpts From First Opinion United States Court of Appeals (Reported 226 F. 2nd 297).

As far as the Indiana bank is concerned, we do not think there was any evidence of bad faith. There is nothing in the evidence presented by the plaintiff to evidence bad faith on the part of the Indiana bank, but the plaintiff relies upon evidence which was elicited from defense witnesses. There was evidence that the Indiana bank paid Parnell in bills of small denominations, the largest being one hundred dollar bills. There was also evidence that when the Indiana bank received credit from the Federal Reserve Bank for the bonds, a cashier telephoned to inform Parnell that the bonds had been cashed. In all these transactions, according to the plaintiff, Parnell acted for an undisclosed principal. These facts are all that plaintiff can rely on to sustain its burden of proof. Accepting these facts as we have outlined them, we do not think they show any bad faith on the part of the Indiana bank.

But an examination of the record does not disclose that Parnell specifically asked for small denominations, and

there is uncontradicted testimony by the cashier that the Indiana bank never carried on hand bills of a larger denomination than one hundred dollars. The evidence of small bills, of course, would be immaterial on the issue of good faith in accepting the first bonds. Even assuming the Indiana bank had larger bills and Parnell specifically requested small bills, the bank would not know this "suspicious" circumstance until after it had given Parnell the cashier's check. As to the second transaction, we must remember that almost a month had passed since the first transaction without any notice from the Federal Reserve Bank or anyone else that the first bonds were stolen bonds. As for the telephone calls from the cashier, the record does not at all indicate that the calls were special calls made directly to Parnell personally in some (fol. 65) secretive manner. In fact, the record indicates that Parnell's office received a call in September, when he was out of town, in connection with the cashing of certain bonds. In any event, it is difficult to see how a cashier's calls to a customer, who was also a director of the bank, awaiting payment of bonds indicates lack of good faith on the part of the Indiana bank. Many bank customers would demand such service.

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## APPENDIX C.

### Opinion of United States Supreme Court and Dissenting Opinion.

Mr. Justice Frankfurter delivered the opinion of the Court.

Petitioner, alleging diversity of citizenship, brought suit in the District Court for the Western District of Pennsyl-

vania alleging that in September and October 1948 two individual defendants, the First National Bank in Indiana and the Federal Reserve Bank of Cleveland had converted 73 Home Owners' Loan Corporation bonds which belonged to petitioner. Only Parnell and the First National Bank are respondents here since the Federal Reserve Bank was dismissed, on its motion, after petitioner had presented its case in the District Court, and since Rocco did not appeal from the District Court's judgment.

At the trial it appeared that these bonds were bearer bonds with payment guaranteed by the United States. They carried interest coupons calling for semi-annual payment. They were due to mature May 1, 1952, but pursuant to their terms, had been called on or about May 1, 1944. On May 2, 1944, the bonds disappeared while petitioner was getting them ready for presentation to the Federal Reserve Bank for payment. In 1948 they were presented to the First National Bank for payment by Parnell on behalf of Rocco. The First National Bank forwarded them to the Federal Reserve Bank of Cleveland. It cashed them and paid the First National Bank, which issued cashier's checks to Parnell. Parnell then turned the proceeds over to Rocco less a fee—there was conflicting testimony as to whether the fee was nominal or substantial.

The principal issue at the trial was whether the respondents took the bonds in good faith, without knowledge or notice of the defect in title. On this issue the trial judge charged:

> "As I have indicated, however, in the case—and if you find in this case that the plaintiff owned these bonds, that they were stolen from it—then the burden of proof so far as this plaintiff is concerned is to show that fact, that these bonds were owned by it, that they were lost by it in the manner as shown by its evidence.

> Then the two defendants, Parnell and the bank, not claiming to be owners for value, but as conduits for redemption, must come forward and they then have the burden of showing that they acted innocently, honestly, and in good faith * * *"

The jury brought in verdicts for petitioner against both respondents. On appeal, the Court of Appeals for the Third Circuit, the seven circuit judges sitting *en banc*, reversed, with three judges dissenting. It held that the District Court had erred in treating the case as an ordinary diversity case and in regarding state law as governing the rights of the parties and the burden of proof. 226 F. 2d 297. It considered our decision in *Clearfield Trust Co. v. United States*, 318 U. S. 363, controlling and held that federal law placed the burden of proof on petitioner to show notice and lack of good faith on the part of respondents. The court further found that there was no evidence of bad faith by the First National Bank since the bonds were not "overdue" as a matter of federal law when presented to it and therefore directed entry of judgment for it. The court found that there was evidence of bad faith on the part of Parnell but ordered a new trial because of the erroneous instructions.

The dissenters agreed in applying the doctrine of the *Clearfield Trust* case to determine the nature of the contract and the rights and duties of the United States as a party but not the rights of private transferees among themselves. They, like the majority, looked to federal law to determine whether the bonds were "overdue paper" when presented to the First National Bank. They concluded that since the respondent bank knew of the call, as to it, the bonds became demand paper and that the bank took the paper an unreasonable length of time after maturity, as advanced by the call.

In the view of the dissenters state law was controlling with respect to proof of good faith and the burden thereon. They found that state law placed the burden of proof on respondents to demonstrate their good faith, and that there was sufficient evidence to support the jury's verdict that the burden of proving good faith had not been sustained even if, with respect to the respondent bank, the bonds were not to be regarded as demand paper taken an unreasonable time after maturity, as advanced by the call.

Petitioner sought a writ of certiorari to review the judgments of the Court of Appeals. Because the determination of the applicable law raised an important issue of federal-state relations, we granted certiorari. 350 U. S. 963.

The District Court in this suit, based on diversity jurisdiction, for the conversion in Pennsylvania of pieces of paper of defined value deemed itself a court of Pennsylvania in which, in view of the nature of the claim, Pennsylvania law would govern. See *Guaranty Trust Co. v. York*, 326 U. S. 99, 108. But respondents claim, and the Court of Appeals sustained them, that the decision in *Clearfield Trust Co. v. United States*, 318 U. S. 363, compels the application of federal law to the entire case. The Court of Appeals misconceived the nature of this litigation in holding that the Clearfield Trust case controlled. In that case we held that a suit by the United States to recover on an express guaranty of prior endorsements on a Government check with a forged endorsement was governed by federal law. The basis for this decision was stated with unclouded explicitness:

> "The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even with-

> out the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty." 318 U. S., at 367.

Securities issued by the Government generate immediate interests of the Government. These were dealt with in *Clearfield Trust* and in *National Metropolitan Bank v. United States,* 323 U. S. 454. But they also radiate interests in transactions between private parties. The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of Government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.

We do not mean to imply that litigation with respect to Government paper necessarily precludes the presence of a federal interest, to be governed by federal law, in all situations merely because it is a suit between private parties, or that it is beyond the range of federal legislation to deal comprehensively with Government paper. We do not of course foreclose such judicial or legislative action in appropriate situations by concluding that this controversy over burden of proof and good faith represents too essentially a private transaction not to be dealt with by the local law of Pennsylvania where the transactions took place. Federal law of course governs the interpretation of the nature of the rights and obligations created by the Government bonds themselves. A decision with respect to

the "overdueness" of the bonds is therefore a matter of federal law, which, in view of our holding, we need not elucidate.

This conclusion requires reversal of the judgments of the Court of Appeals but not reinstatement of the judgments of the District Court. The Court of Appeals did not originally consider all the points raised by respondents. Moreover, since the Court of Appeals misconceived the applicable law, it is for that court to review the judgments of the District Court in the light of the controlling state law. The Court of Appeals has not decided what the governing state law on burden of proof is, and it is the court which should so decide. Likewise, if state law casts the burden on respondents to demonstrate their good faith, it is for the Court of Appeals to assess the evidence in light of that standard.

The judgments of the Court of Appeals for the Third Circuit are therefore reversed and the cases are remanded to that court for proceedings in conformity with this opinion.

Reversed and remanded.

**Dissenting Opinion.**

Mr. Justice Black and Mr. Justice Douglas, dissenting.

The "federal law merchant" which *Clearfield Trust Co. v. United States*, 318 U. S. 363, 367, held applicable to transactions in the commercial paper of the United States should be applicable to all transactions in that paper. Indeed we said in *National Metropolitan Bank v. United States*, 323 U. S. 454, 456, that "legal questions involved in controversies over such commercial papers are to be resolved by the application of federal rather than local law."

Not until today has a distinction been drawn between suits by the United States on that paper and suits by other parties to it. But the Court does not stop there. Because this is "essentially a private transaction," it is to be governed by local law. Yet the nature of the rights and obligations created by commercial paper of the United States Government is said to be controlled by federal law. Thus, federal law is to govern some portion of a dispute between private parties, while that portion of the dispute which is "essentially of local concern" is to be governed by local law. The uncertainties which inhere in such a dichotomy are obvious.

The virtue of a uniform law governing bonds, notes, and other paper issued by the United States is that it provides a certain and definite guide to the rights of all parties rather than subjecting them to the vagaries of the law of many States. The business of the United States will go on without that uniformity. But the policy surrounding our choice of law is concerned with the convenience, certainty, and definiteness in having one set of rules governing the rights of all parties to government paper, as contrasted to multiple rules. If the rule of the *Clearfield Trust* case is to be abandoned as to some parties, it should be abandoned as to all and we should start afresh on this problem.

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## APPENDIX D.

### Second Opinion of United States Court of Appeals.

By Goodrich, Circuit Judge.

These cases are before this Court on remand from the Supreme Court of the United States, 352 U. S. 29 (1956).

The original suit was brought to recover the proceeds of certain bonds guaranteed by the United States and alleged to have been stolen from the plaintiff. It was further alleged that the bonds were paid by the Federal Reserve Bank of Cleveland to the defendant, First National Bank in Indiana, Pennsylvania, which in turn paid the proceeds to the defendant, Parnell, who in turn turned over all or part of the money to the defendant, Rocco. The Federal Reserve Bank of Cleveland was also an original defendant but was dismissed during the litigation. Rocco had judgment given against him but did not appeal. At the trial in the district court judgment was also given against Parnell and the Indiana Bank. When the case came to this Court the judgment was reversed, *226 F. 2d 297 (1955)*.

The case was heard by the full court which divided four to three. The difference between majority and minority was with regard to whether federal or state law applied as to the burden of proof to establish one a holder in due course of a negotiable instrument. The majority of the court thought that *Clearfield Trust Co. v. United States*, 318 U. S. 363 (1943), required the application of federal law and that the federal rule differed from that in Pennsylvania. The minority believed that since this was but an action between individuals, in which the United States was not concerned, the state law controlled. The Supreme Court, in holding that the *Clearfield* case did not apply, said:

> "The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of Government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regard-

> ing the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern." 353 U. S. at 33, 34.

The case was, therefore, remanded to this Court to determine the law of Pennsylvania and to see whether it was correctly applied at the trial to the facts brought out in evidence. This necessarily will take us over some of the ground covered in our original discussion in both majority and minority opinions.

## I. The Pennsylvania Law.

The governing statute at the time the transactions herein took place was the Negotiable Instruments Law. The bonds were bearer paper. Under the statute one who is in possession of negotiable paper payable to bearer is a holder. *Negotiable Instruments Law*, 191; Pa. Stat. Ann. tit. 56, 492 (Purdon 1930). Rocco, Parnell and the Indiana Bank were all holders under this definition. Not only that, but they were persons to whom the instrument had been negotiated. Section 30 of the Negotiable Instruments Law states:

> "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery." Pa. Stat. Ann. tit. 56, 81 (Purdon 1930).

Now we come to the provision of the law that contains the controlling language for this case. That is Section 59 of the Negotiable Instruments Law and here is the appropriate section as it appears in Purdon's:

> "Burden of proof when title is defective.

> "Every holder is deemed *prima facie,* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." Pa. Stat. Ann. tit. 56, 139 (Purdon 1930).

This section has been applied in almost innumerable law suits, as an inspection of any one of the books on the Negotiable Instruments Law will show. The point is made on behalf of the defendants that in this case we have an action for conversion of stolen instruments and not a suit against one of the parties thereon. The argument is pressed that the cited section refers to actions on the instrument only and not to such a case as this. *Filosi v. Crossman,* 111 Conn. 178, 149 Atl. 774 (1930), is cited in support of this argument. The language of Chief Justice Wheeler does support it.

But we are dealing only with Pennsylvania law in this particular phase of the inquiry. In *Schultheis v. Sellers,* 223 Pa. 513, 72 Atl. 887 (1909), Mr. Justice Mestrezat pointed out that almost a century before that:

> "* * * it was held, in an action on a promissory note, that the holder was required to show the consideration he paid for it and how it came into his hands, where the defendant proved that it was put into circulation fraudulently. This rule has been recognized and enforced in subsequent decisions." 223 Pa. at 516, 72 Atl. at 888.

The quotation just made is applicable to a suit upon the instrument and does not precisely meet the defendants' point. But *First National Bank of Blairstown v. Goldberg,* 340 Pa. 337, 17 A. 2d 377 (1941) does meet it. Mr. Justice Stern says for the court:

> "It was incumbent upon plaintiff to prove only its ownership and loss of the bonds, and the burden would then have shifted to defendants to show that they came into possession of the securities under such circumstances as to relieve them from liability for a conversion." 340 Pa. at 340, 17 A. 2d at 378.

In the Goldberg case the court came to the conclusion that under the proof the defendant was entitled to judgment. But the application of the law seems to us very clear. The discussion in the opinion referring to the Restatements of Agency and Torts, on which the appellants rely, is all based on the hypothesis of the good faith of the defendants in handling a negotiable instrument.

Again in *Brubaker v. County of Berks*, 381 Pa. 157, 112 A. 2d 620 (1955), we have the rule of the Negotiable Instruments Law applied in a case where the suit was not upon the instrument. The same application of the statute was made as in the *Goldberg* case.

We find no difficulty in determining Pennsylvania law which is in accord with the majority rule prior to the Negotiable Instruments Law and the overwhelming weight of authority since. The burden of proof set out in Section 59, above quoted, is applicable in this case.

## II. The Case for the Jury.

As to Parnell, let us quote from the majority opinion when the case was here before. It will be remembered that the majority were going on the theory that the plaintiffs, not the defendants, had the burden on the issues of good faith and lack of value. Nevertheless, the Court said (as to Parnell):

> "There was evidence which, if believed, would sustain the jury's verdict that he acted in bad faith. From Rocco's testimony, the jury could have inferred

> that Parnell's fee for cashing the bonds was extremely high, being approximately ten per cent of the value of the bonds. A fee of five or six thousand dollars for the mere transmittal of bonds for redemption would be sufficient evidence from which a jury could find bad faith." *226 F. 2d at 302.*

With the burden of proof upon Parnell, not the Bank of America, the result is *a fortiori.*

As to the Indiana Bank, we think that there is enough evidence to support the jury's verdict, remembering that the burden is on that Bank to prove that it was a holder in due course. The Bank's then cashier admitted that he knew that the bonds had been called. The circumstances with regard to the negotiation were such as to arouse some suspicion. The two batches of bonds were concerned and one earlier had been collected by the bank on behalf of Parnell. Each time notification was given him by telephone by the same bank cashier. Each time he received a cashier's check and proceeded to cash the check in small bills forthwith. These items, of course, are not conclusive.

But it is to be remembered that the burden is on the bank. Its then cashier testified that he had no notice of any defect of title. His memory was vague on many surrounding circumstances concerning the transactions. That in itself is not enough to prove him dishonest since the transactions occurred some time before trial. But the jury saw the witness and heard his testimony. They had the fact, introduced in rebuttal, that he had been convicted of a felony of embezzlement. This was introduced without fanfare and whether it influenced the jury's consideration of his testimony we cannot know. The jury was not compelled to believe this bank officer. We have reread the testimony on this point. It does not justify setting aside a verdict against the party who had the burden of establishing good faith and lack of notice.

## III. Joint and Several Tortfeasors.

At the first hearing of the case here the defendant bank raised the question of liability under Pennsylvania law of joint and several tortfeasors. This point was taken up in the dissenting opinion but not covered by the majority opinion since the majority was not called upon to decide it. The Supreme Court however, has sent the case back here to determine the undecided points. And so we repeat pretty largely what was said in the dissenting opinion.

Defendant bank asked for an instruction to the effect that the plaintiff could not have a verdict against more than one of these alleged converters. This instruction was refused and it claims error. We think the bank is incorrect. The general rule with regard to the liability of several persons in such an action as this is that the satisfaction of the judgment against one precludes proceeding against another. This is the rule as it appears in the Restatement, Torts, 886; Restatement, Judgments, 95, and this is the rule as it is generally applied in Pennsylvania. *Union of Russian Societies of St. Michael & St. George, Inc. v. Koss,* 348 Pa. 574, 36 A. 2d 433 (1944). There is some early authority in Pennsylvania that seems to indicate in actions for conversion that the securing of a judgment against one alleged tortfeasor has the same effect. See, *e.g., Hyde v. Kiehl,* 183 Pa. 414, 38 Atl. 998 (1898). These cases are not new and the authorities above cited announce the present-day rule. Whether the older cases represent the present law of Pennsylvania is doubtful. See Goodrich-Amram, Pennsylvania Procedural Rules Service, 2229 (b), 2232 (f)-1 (1940). But even then they do not go so far as to preclude a verdict against more than one defendant. It might well be, if they were still effective, that a plaintiff would have to elect, before judgment

was entered, which defendant he wanted to pursue. There is, we conclude, no merit in this point made by the defendant.

### IV. Certain Objections to Evidence.

The defendants claim prejudice when the trial judge refused to allow them to show the remarks of the sentencing judge at the time the bank cashier was convicted. This is not a proper subject for complaint. The extent to which a witness may be rehabilitated after his credibility is attacked by showing that he has been convicted of a felony is a matter in which the trial judge has, and must have, wide control. *United States v. Boyer,* 150 F. 2d 595 (D. C. Cir. 1945.)

There were certain exhibits to which objection was made. These consisted of a notice sent out by the Federal Reserve Bank of San Francisco to the Pittsburgh Branch, Federal Reserve Bank of Cleveland and a copy of a notice circulated by the Federal Bureau of Investigation in the area of the Pittsburgh Branch of the Federal Reserve Bank of Cleveland. It is not claimed that any of these reached the Indiana Bank so as to charge it with the knowledge which these notices contained. The judge limited their use to the establishment of the loss by the plaintiff and that notices of the loss went out through banking channels. This was not error. The analogy of the "hue and cry" immediately suggests itself. And we think that the fact of a notice being broadcast in the bank's vicinity is admissible on the question of whether the bank may have had some knowledge.

The lack of possible harm from these exhibits even if the judge was too lenient in admitting them is observed

when one reads the interminable colloquy which preceded their admissions. At least six lawyers were involved and questions and objections came with rapid-fire frequency. One may seriously doubt whether the documents had any significance at all as they got to the jury. Nothing was said about them in the judge's charge and no one asked the judge to say anything more than he did on the point. It seems clear to us going through the record of a vigorously contested trial that instances of this kind are swallowed up in the sum total of the testimony and have no significance until lawyers examine the record to find error.

The case was technical. The Trial judge instructed the jury fully and accurately. The jury has reached a permissible conclusion.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*